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August 23, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 93-136
RM-8161

Filing of Reply Comments in Rulemaking Proceeding
Key Colony Beach, Key Largo, and Marathon, Florida

Dear Mr. Caton:

On behalf of Spanish Broadcasting System of Florida, Inc., licensee of Radio Station WZMQ(FM), Key Largo, Florida, and petitioner in the above-referenced Docket for a channel substitution and license modification for Station WZMQ(FM), there is transmitted herewith an original and four copies of its Reply Comments to Counterproposals in response to the Commission's Notice of Proposed Rulemaking and Order to Show Cause in the above-referenced matter released June 3, 1993.

Should there be any questions concerning the enclosure, kindly contact the undersigned counsel to the licensee.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

By: 

James M. Weitzman

Enclosure

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Federal Communications Commission

AUG 23 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Amendment of Section 73.202(b)
Table of Allotments
FM Broadcast Stations
(Key Colony Beach, Key Largo
and Marathon, Florida)

)
)
) MM Docket No. 93-136
) RM-8161
)
)
)

TO: Chief, Allocations Branch
Mass Media Bureau

REPLY COMMENTS TO COUNTERPROPOSALS

Spanish Broadcasting System of Florida, Inc. ("SBS"), licensee of Station WZMQ(FM), Key Largo, Florida, by its counsel, hereby respectfully submits its Reply Comments in the above-referenced proceeding to two counterproposals filed on July 26, 1993¹ following publication of the Notice of Proposed Rulemaking released on June 3, 1993 ("NPRM").

1. Counterproposal of Key Chain, Inc.

Key Chain, Inc., licensee of Station WAVK(FM), Marathon, Florida, counterproposed Channel 288C2 in lieu of Channel 288A as proposed by the Commission in the NPRM (RM-8309).

Inasmuch as this Counterproposal ("Key Chain Counterproposal") would be consistent with the other changes proposed by the NPRM and would actually bring additional service to 821 underserved people (see the attached Engineering Statement

¹ The Commission issued a Public Notice on August 6, 1993 announcing the receipt of these counterproposals and soliciting comments no later than fifteen days after the date of the Public Notice. Accordingly, these Reply Comments are timely filed.

of Herman Hurst ("Hurst Statement") set forth at Attachment 1 hereof), SBS supports adoption of the Key Chain Counterproposal together with the other changes proposed in the NPRM.

2. Counterproposal of Okeechobee Broadcasters, Inc., Sunshine Broadcasting, Inc. and Jupiter Broadcasting Corporation.

The second counterproposal ("Joint Counterproposal") was filed by Okeechobee Broadcasters, Inc. ("OBI"), licensee of WOKC-FM, Indiantown, Florida; Sunshine Broadcasting, Inc. ("Sunshine"), licensee of WSUV(FM), Ft. Meyers Villas, Florida; and Jupiter Broadcasting Corporation ("JBC"), permittee of WADY(FM), Jupiter, Florida (hereinafter collectively, the "Joint Counterproponents"). The Joint Counterproposal would have the Commission reject altogether the proposals of the NPRM and instead change the allotments of five stations --- the Joint Counterproponents three stations plus two additional stations. The avowed purpose of these five changes would be to allow upgrades of the Joint Counterproponents' stations. Four of the five changes involve moves to non-adjacent channels.

SBS vigorously opposes the Joint Counterproposal and, as will be shown below, respectfully suggests that it is procedurally, substantively and technically defective and not in the public interest.

A. Background

As was set forth in SBS' Petition for Rulemaking ("SBS Petition"), the channel changes proposed by SBS and thereafter by

the Commission in the NPRM, had their basis in the third-order receiver-induced intermodulation interference ("RITOIE") problem which is being caused to the reception of WCTH(FM), Plantation Key, Florida. The co-location and frequency relationship of WKLG(FM), Rock Harbor, Florida and WZMQ(FM), Key Largo, Florida produce RITOIE in the Key Largo area and prevent satisfactory reception of WCTH on some FM radios. The channel changes proposed would eliminate the RITOIE by changing the frequency combinations in the Key Largo area.

In its Comments, filed in response to the NPRM, SBS extensively documented the existing RITOIE problem. SBS submitted the statement of Charles R. Dreher, technical consultant to WZMQ, who detailed the tests he conducted and described tests conducted by Michael Nicolay, an engineer with the firm of Carl T. Jones Corporation. Both tests conclusively proved the existence and extent of the interference. Furthermore SBS submitted the statement of E.W. Bie, technical director of WCTH, who also attested to the presence and effect of such interference and recounted listener complaints regarding same.

The Joint Counterproposal ignores the necessity of channel changes proposed in the NPRM in order to propose five channel changes of its own designed to get the Joint Counterproponents' channel upgrades. Four of the five channel changes are for non-adjacent channels. The Joint Commentors states that no competing expressions of interest need be entertained for any of these channels since the Indiantown

upgrade, which is the only on-channel or adjacent channel change of the entire group, relies on the non-adjacent channel change at Naples, which, in turn, requires non-adjacent channel changes at Ft. Myers Villas and at Clewiston, which, in turn, requires the non-adjacent channel change at Jupiter. The Joint Counterproponents maintain that competing expressions of interest can't be allowed for the non-adjacent channel changes under Commission policy because one or more of the new channels would not be available but for the multi-station changes and swaps being proposed.

The Joint Counterproponents also disclaim the existence of the RITOIE interference documented by SBS and state that there is no evidence of such interference.

B. The Record Contains Abundant Evidence of the RITOIE Interference.

As discussed above, SBS' Comments contained statements by its own technical consultant and of the technical consultant of WCTH, the station suffering the interference, as to their own tests confirming the existence of the RITOIE. Mr. Dreher's statement also refers to tests conducted by a Washington, D.C. consulting engineer, Michael Nicolay of Carl T. Jones Corporation, confirming the interference to WCTH reception.

Not mentioned by the Joint Counterproponents but clearly present in the Docket prior to the date of the Joint Counterproposal are additional statements concerning the existence and harm caused by such interference.

A statement filed by Florida Keys Electric Cooperative Association, Incorporated ("FKEC"), the electric utility supplying electricity to all of the Florida Keys, indicates that such interference prevents them from utilizing the electric load control system being broadcast on WCTH's subcarrier. "Without effective load control, FKEC's ability to furnish an uninterrupted supply of electricity to the Keys during peak loads is adversely effected. The interference to WCTH has a significant detrimental effect on our system." Excerpts from statement of Charles A. Russell, General Manager of Florida Keys Electric Cooperative Association, Inc. FKEC urged the Commission to expedite action on the rulemaking petition and on the construction permit applications to effect the frequency change.

A second statement also conveniently ignored by the Joint Counterproponents was filed by Mary Kay Reich, Commissioner, County of Monroe, Florida. Commissioner Reich noted her own interference reception in the Key Largo area as well as her awareness of the effect of such interference on the local electrical utility's ability to shed load during periods of peak demand. She called for quick action in resolving the interference by effecting the channel changes.

It is disingenuous for the Joint Counterproponents to have ignored all of the foregoing evidence of interference in their zeal to have the Commission reject the proposal set forth in the NPRM and instead adopt the five channel changes they urge on the Commission. The interference does exist, and the proposed

allocation changes set forth in the NPRM will remedy the situation. The Joint Counterproponents have themselves suggested no alternative plan which would achieve the same end. Their disregard of the interference must be seen as a failure to face facts that argue against their own proprietary interests.

C. The Joint Counterproposal is Procedurally Defective and Must be Dismissed.

The Joint Counterproposal is procedurally defective in several respects. First and most important, the Joint Counterproposal fails to state that the Joint Counterproponents will reimburse Sterling Communications Corporation ("Sterling"), licensee of Station WSGL(FM), Naples, Florida for the channel change, from Channel 276C3 to Channel 292C3, it seeks to force upon Sterling. This omission is fatal to the Joint Counterproposal.

When the allotment of a channel requires an existing station to modify its operation by specifying a new channel, it is well-established Commission policy that licensees and permittees required to change channels so as to allow a new allotment elsewhere are entitled to reimbursement. See Circleville, Ohio, 8 FCC 2d 159 (1967).

Moreover, parties filing competing expressions of interest in cases which require channel changes by existing licensees to accommodate the new allotment are also required to state an intention to reimburse the affected parties. The absence of such a statement will render the expression of

interest invalid. These policies will apply to all proceedings where the Notice of Proposed Rulemaking is adopted after the adoption of this Request for Supplemental Information. See Brookville and Punxatawney, Pennsylvania, 3 FCC Rcd. 5555. See also Eldorado and Lawton, Oklahoma, 5 FCC Rcd. 6737 (1990).

Thus, it is clear that when filing a counterproposal, the counterproponent must state that it will reimburse all stations that are entitled to reimbursement. The Joint Counterproposal fails to state that the Joint Counterproponents will reimburse Sterling for the forced channel change of WSGL, Naples and therefore, it is defective and must be dismissed.

The Joint Counterproponents have also failed numerous times to abide by the requirements of the Commission's Rules as respects service. Despite their proposal to change the channels of the Clewiston station, the Joint Counterproponents failed to serve their Joint Comments and Counterproposal of July 26, 1993 on Glades Media Company ("Glades"), licensee of Station WAFC-FM, Clewiston, Florida whose frequency is proposed to be changed from Channel 292A to Channel 258A in the Joint Counterproposal. While a July 23rd letter to two of the three Joint Counterproponents sets forth a conditional consent of Glades to change channel based on compensation and other factors, there is no evidence that Glades was aware of the precise details of or was served a copy of the actual Joint Counterproposal as is required.

Moreover, the Joint Counterproponents filed a July 27, 1993 Supplement to their Joint Counterproposal. There is no

Certificate of Service to indicate that it was served on anyone. SBS was not so served and discovered the Supplement while doing due diligence at the Commission.

D. The Proposed Ft. Myers Villas Channel Cannot be Allocated due to Site Area Unsuitability and Unavailability.

1. Environmental.

It is well-settled policy that the Commission will allot channels if, among other things, there are suitable non-shortspaced areas from which the proposed transmitter can provided line-of-site principal city coverage over the community of license. Absenting compliance with these conditions, the Commission will not allot the channel.

As is pointed out in the Hurst Statement at Attachment 1 hereof, the Joint Counterproponents' reference coordinates for the Ft. Myers Villas channel change lie upon Sanibel Island, within 150 feet of the Bailey Tract, refuge land within the JN (Ding) Darling National Wildlife Refuge. The refuge area hosts alligators, herons, egrets and other wildlife. The manager of the refuge stated emphatically that the construction of a radio tower adjacent to the refuge would have a severe adverse impact on the island's wildlife, some of which is listed as threatened or endangered. The manager further stated his belief that the tower would adversely impact the flight path of thousands of migrating birds, resulting in the death of many of the birds. It is clear that this would have a major adverse environmental impact and would be strongly opposed by the U.S.

Fish and Wildlife service. The Ft. Myers Villas site coordinates advanced by the Joint Counterproponents describe a site which can only be characterized as unsuitable.

Moreover, it is not just the reference coordinates which are adjacent to a sensitive wildlife area but the entire permissible site area identified by the Joint Counterproponents is on Sanibel Island. Thus, the selection of alternate coordinates which nevertheless are still within the same permissible site area would be subject to the same concerns and would be unsuitable for the reasons mentioned above and in the Hurst Statement.

Moreover, the Commission can take official notice that Sanibel Island is unavailable for the construction of radio towers. In the long proceeding involving the allotment of a new channel to Sanibel and the applications filed for construction permit for such channel, the record is replete with the difficulties of obtaining local authority to build a tower.

In its successive applications for extension of time to construct, the successful Sanibel applicant, Ruth Communications Corporation, detailed years of unsuccessful efforts to find a suitable and available transmitting site on Sanibel, all thwarted by environmental and zoning problems. Up to the time that it filed a Petition for Rulemaking to remove the channel from Sanibel to another community for which a site could be found, Ruth continued to run into major obstacles involving

zoning restrictions and the proliferation of eagles nests on the island.

2. Zoning.

The Sanibel Planning Director, Bruce Rogers flatly stated to Ruth then and has stated now to Herman Hurst, SBS engineering consultant, that zoning laws do not permit the construction of towers on Sanibel. Attached to the Hurst Statement is the August 17, 1993 letter of Mr. Rogers confirming this fact.

Given the history of Ruth's attempts over many years to build a tower on Sanibel, its efforts with the U.S. Fish and Wildlife Service, the Florida Game and Fresh Water Fish Commission, the Eagle Technical Advisory Committee, the Florida Department of Natural Resources and the City of Sanibel, it is clear that Sanibel represents an impossible place for the construction of a tower.

Lest it be suggested that the sole existing tower on Sanibel Island, a CATV headend, could be usable, Mr. Hurst points out that even if it were made available, it is not of sufficient height to permit line-of-site principal community coverage to Ft. Myers Villas.

Furthermore, as was pointed out in Ruth's application for extension of time to construct (FCC File No. BMPH-900731IB), which together with Ruth's other modification applications for its Sanibel permit are hereby incorporated by reference, the CATV tower, grandfathered and thus exempt from

compliance with Sanibel's current zoning regulations, is incapable of supporting additional weight. Also, an FM antenna on the tower would cause interference to cable television reception. For these reasons, the tower's owner, Palmer Cablevision, refused Ruth permission to install an FM broadcast antenna on the tower. There is no evidence that the incapability of the structure or Palmer's refusal to accommodate an FM transmitter have changed in the interim.

In recognition of the unavailability of transmitting sites on Sanibel, the Commission adopted a Notice of Proposed Rulemaking on January 15, 1992 in MM Docket 92-10 (the "Notice") wherein it proposed deleting the Sanibel allotment in favor of San Carlos Park, Florida precisely due to the Sanibel site unavailability. In the Notice, the Commission acknowledges that despite years of effort and due to objections from various federal, state and local authorities, the petitioner was unable to operate from Sanibel. So convincing was the evidence of unavailability that the Commission stated that a waiver of the restriction on removal of a sole existing local transmission service was warranted in the Sanibel case.

The Commission has ample authority to investigate the issue of site availability where, if site availability is questioned, the Commission will look into the suitability issue, including local zoning, environmental and air hazard, all at the allocation stage. See Wilmington, N.C., 6 FCC Rcd. 6969 (1991). This is a a wise policy indeed since a five channel change

rulemaking which all hinges on a single questionable site availability may inveigle the Commission for many years to come in a complicated thicket of pleadings, special temporary authority requests and other time-consuming extraspecial pleas and requests, all based upon the "sudden realization that sites are not available".

E. The Joint Counterproposal Creates Little New Service and Significant Loss Area.

The Joint Counterproponents dangle the figure of 1,339,675 people who would receive "greatly improved service to the public and new service". It is significant that the two --- improved service and new service --- are lumped together in a single sentence. This is because the total number of persons currently underserved who would receive a new aural service under their proposal is a grand total of 459. The bulk of additional service under the proposal is being delivered to persons who already have five or more aural services. See the Hurst Statement at Figure 6.

What's worse and what the Joint Counterproponents fail to disclose is that their proposal will cause 25,393 presently underserved people to lose service and will create a new underserved area of 4,016 people who will, for the first time, receive fewer than five aural services. See the Hurst Statement at Figure 6.

These results hardly auger well for the public interest. They also fly in the face of the criteria used by the

Commission in determining whether changes to the Table of Allotments are in the public interest. Additional service to well-served areas at the direct expense of and made possible only through the creation of underserved areas is not within the Commission's customary practice. Nor should it be here.

In comparison, the NPRM proposal together with the Key Chain Counterproposal would provide primary service coverage to an underserved population of 821 persons. See Hurst Statement and Figure 7 thereof. No loss area whatsoever would be created. In stark contrast, the Joint Counterproposal would bring new service to only 429 underserved people while at the same time lose service for 25,393 presently underserved people and create a new underserved area of 4,016 people. Under standards commonly employed by the Commission to compare conflicting proposals, the NPRM plus Key Chain Counterproposal wins hands down.

Conclusion

The interference which gave rise to the Petition for Rulemaking has been shown to exist without question through statements of competent engineers, local officials and the public electric utility, all of whom seek its elimination through the proposal set forth by the Commission in the NPRM.

The Joint Counterproposal is procedurally deficient due to its explicit failure to state that WSGI will be reimbursed for its involuntary channel change.

Moreover, the proposed coordinates and the entire available site area for the Ft. Myers Villas channel are on Sanibel Island

which are unsuitable from environmental and zoning perspectives for transmitting towers and, as such, the Ft. Myers Villas channel requested by the Joint Counterproponents can't be allotted. Without such channel change, the remainder of the Joint Counterproposal cannot be effectuate.

Furthermore, the Joint Counterproposal will produce little new service to underserved areas but will cause significant service losses and create new underserved areas.

For the foregoing reasons, the Joint Counterproposal must be denied.

Respectfully submitted,

SPANISH BROADCASTING SYSTEM
OF FLORIDA, INC.

By: 

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Its Attorney

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August 23, 1993

ATTACHMENT 1

ENGINEERING STATEMENT OF HERMAN HURST



EXHIBIT 1

STATEMENT OF HERMAN E. HURST, JR.
IN SUPPORT OF REPLY COMMENTS
IN MM DOCKET NO. 93-136

Prepared for: Spanish Broadcasting Systems of Florida, Inc.

I am a Radio Engineer, an employee in the firm of Carl T. Jones Corporation, with offices located in Springfield, Virginia.

My education and experience are a matter of record with the Federal Communications Commission.

This office has been authorized by Spanish Broadcasting Systems of Florida, Inc. ("SBS"), licensee of WZMQ(FM), Key Largo, Florida, to prepare this statement and supporting figures in support of its Reply Comments in MM Docket No. 93-136.

BACKGROUND

SBS is the petitioner whom initiated MM Docket No. 93-136 in an attempt to alleviate the effects of receiver-induced third order intermodulation interference (RITOI) occurring near the WZMQ(FM) multiple-use transmitter site [radio stations WZMQ(FM), 103.9 Mhz, and WKLG(FM), Rock Harbor, Florida, 102.1 Mhz, operate from a shared antenna]. This co-location and the two stations' frequency relationship is the cause of a receiver-induced intermodulation product on 100.3 Mhz, the licensed transmit frequency

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REPLY COMMENTS -- MM DOCKET NO. 93-136
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for WCTH(FM), Plantation Key, Florida. The existence of this interference is documented in SBS' Comments in the instant proceeding.

On July 26, 1993, Key Chain, Inc., licensee of WAVK(FM), Marathon, Florida, filed a counterproposal ("Key Chain Counterproposal") in the instant proceeding seeking an upgrade from Channel 292A to Channel 288C2. The SBS petition originally proposed Channel 288A for the Marathon assignment. The Key Chain Counterproposal is fully compatible with the SBS petition, and SBS supports the Key Chain Counterproposal.

Also, on July 26, 1993, Okeechobee Broadcasters, Inc., licensee of WOKC-FM, Indiantown, Florida; Sunshine Broadcasting, Inc., licensee of WSUV(FM), Fort Myers Villas, Florida; and Jupiter Broadcasting Corporation, permittee of WADY(FM), Jupiter, Florida, (hereinafter "Commentors") filed *Joint Comments and Counterproposal* ("Joint Counterproposal") in MM Docket No. 93-136. The Commentors have advanced a five channel facility change which conflicts with the SBS Petition to Amend the FM Table of Allotments ("SBS Petition"). The Commentors' proposed changes are as follows:

	Channel	
	<u>Delete</u>	<u>Add</u>
Indiantown	276C2	276C1
Naples	276C3	292C3
Fort Myers Villas	292A	275C2
Clewiston	292A	258A
Jupiter	258A	292C3

JOINT COUNTERPROPOSAL IS TECHNICALLY INFEASIBLE

The Commentors contend that each proposed channel change/upgrade is contingent upon another of its proposed changes. Thus, the Indiantown upgrade is contingent upon the Naples channel change, which is contingent upon the Ft. Myers Villas and Clewiston channel changes, which are in turn contingent upon the Jupiter channel change. Specifically, as stated on Page 4 of the Joint Counterproposal:

"The only channel on which WOKC-FM at Indiantown can upgrade is 276C1, which requires that WSUV at Fort Myers Villas move from Channel 292A; the only channel that can be allocated to Fort Myers Villas is 275C2;"

The Commentors rely on this assertion to support their claim that no competing expressions of interest may be filed with respect to their proposed channel changes/upgrades. In light of the above, should one of the proposed channel changes prove infeasible or technically unacceptable, the Commentors' entire scheme becomes unacceptable.

The Counterproposal fails precisely because one such channel change is not feasible. It is submitted that the proposed channel change and upgrade for Fort Myers Villas on Channel 275C2 is technically unacceptable.

The reference coordinates specified for the upgraded channel to serve Fort Myers Villas lie upon Sanibel Island within 150 feet of the Bailey Tract, refuge land within the JN (Ding) Darling National Wildlife Refuge (See Figure 1). The Bailey Tract is a refuge area

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REPLY COMMENTS -- MM DOCKET NO. 93-136
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where alligators, herons, egrets, and other wildlife are found. There are no indications that the Commentors had advance consultations with the United States Fish and Wildlife Service or the City of Sanibel regarding the viability of a tower structure within the specified permissible site area [See *FM Channel Assignments at Bay Shore, N.Y.*, 20 RR 2d 1556 (1970)].

Based on inquiries made by this office to determine the exact boundary of the JN (Ding) Darling National Wildlife Refuge, we were informed that the construction of an FM broadcast antenna and supporting tower would not be environmentally compatible with U.S. Fish and Wildlife Service goals. In fact, Refuge Manager, Mr. Lou Heinz, voiced strong opposition to a tower of such magnitude (as stated below the tower would be required to be a minimum of 350 feet above ground level) "anywhere on the island" due to the severe adverse impact the tower would have on the island's wildlife, some of which is listed as threatened or endangered. Mr. Heinz also indicated that although the reference coordinates for the proposed tower site do not lie directly on land owned by the Fish and Wildlife Service, the tower construction and proposed tower placement would adversely impact the flight path of thousands of migrating birds resulting in the death of many of the birds.

Not only do the reference coordinates lie upon Sanibel Island directly adjacent to a sensitive wildlife area, but the entire permissible site area identified by the Commentors

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is on Sanibel Island.¹ It is a matter of record with the Federal Communications Commission that Sanibel Island is an unsuitable location for a broadcast tower both from a zoning aspect and from an environmental aspect [See MM Docket No. 92-10, *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Sanibel and San Carlos Park, Florida)*, RM-7865, Adopted January 15, 1992, Released January 28, 1992; see also, WRWX, Sanibel, Florida, seven Applications for Extension of Time to Construct]. The attached letter from Sanibel City Official Mr. Bruce Rogers states that a tower is not a permitted use under the city's zoning laws. (See Figure 3.)

A proponent for a Petition to Amend the FM Table of allotments must specify a "suitable" transmitter site to accommodate an upgraded facility.² The FCC most recently affirmed this rule in its *Report and Order* concerning the *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, MM Docket No. 92-159, Adopted June 4, 1993, Released July 3, 1993. In this proceeding, the Commission introduced a new one-step process in which an FM applicant would be permitted to change channel or class by application. At paragraph 13 of the *Report and Order*, the Commission stated:

¹The Fort Myers Villas, Channel 275C2 Permissible Site Area is plotted on the attached Figure 2.

²See 47 C.F.R. § 73.208(a)(2).

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"However, since it would be contrary to sound allotment policy for parties to receive modifications by using the one-step process that would be denied under the two-step process, all applicants using the one-step process must also demonstrate that a suitable site exists which would comply with allotment standards with respect to minimum distance separation and city-grade coverage.¹⁹"

At footnote 19, the Commission reiterates its "suitable site standard" stating:

"In making this showing, an applicant must include a separate exhibit to the application which shows that the allotment reference site would meet allotment standards with respect to spacing and city grade coverage and that it would be suitable for tower construction. This exhibit must include a site map or, in the alternative, a statement that the transmitter will be located on an existing tower. Generally speaking, examples of unsuitable allotment reference sites include those which are offshore, in a national or state park in which tower construction is prohibited, or an airport, or otherwise in an area which would necessarily present a hazard to air navigation. Consistent with existing allotment standards, the applicant is not required to submit a certification of site availability concerning the allotment reference site."

The Commentors proposed Fort Myers Villas FM facility must have a minimum antenna height of 350 feet above ground level ("AGL") from the allotment reference coordinates on the island in order to provide Fort Myers Villas with the requisite city grade coverage.³ Based on a review of the record in MM Docket No. 92-10, as well as telephone discussions with representatives of the Fish and Wildlife Service assigned to the JN (Ding) Darling National Wildlife Refuge and the Planning Department of the City

³Pursuant to Section 73.211 of the FCC Rules, the maximum allowable Class C2 ERP is 50 kW.

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of Sanibel, this office has confirmed that construction of a new 350-foot AGL tower on Sanibel Island is not possible. One 200-foot AGL tower used for a CATV head-end exists on the island. This one structure was "grandfathered" when the current land use law was adopted. Use of the existing CATV tower is not technically feasible. Even if it could be used for FM broadcasting, a channel 275C2 facility operating from this tower would fail to provide principal community service to Ft. Myers Villas due to inadequate height. Consequently, due to the environmental and zoning restraints over the entire permissible site area, a fully-spaced SUITABLE allotment reference site does not exist for the Fort Myers Villas proposed upgrade.

JOINT COUNTERPROPOSAL HAS NET SERVICE LOSS NOT SERVICE GAIN

Even assuming the joint counterproposal was technically feasible, which it is not, the public interest benefits associated with the Joint Counterproposal are minimal, and its public interest shortcomings are significant. This is due to the significant number of underserved people who would lose service and the substantial amount of new underserved area which would be created by the effectuation of the Joint Counterproposal.

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This firm has prepared a number of figures to demonstrate these facts. Figure 4 depicts the predicted 1.0 mV/m primary service coverage from WAFC-FM, Clewiston, Florida, operating as authorized in its outstanding construction permit (Channel 292A, 2.1 kW ERP, 168 m HAAT, See FCC File No. BPH-901224IA) in comparison to the primary service coverage resulting from a maximum Class A facility (6.0 kW ERP, 100 m HAAT) operating from the Commentors' Clewiston allotment reference site on Channel 258A. Figure 4 also depicts the pertinent arc of the primary service contours of the other full-time aural services which intersect the WAFC-FM gain and/or loss area (See Key to Figure 4). The shaded areas on Figure 4 represent the underserved areas either within the WAFC-FM gain area or the WAFC-FM loss area. The number of full-time aural services available to these underserved areas are represented by the numbers within the shaded areas.

In the same manner as Figure 4 described the Clewiston situation, Figure 5 depicts the gain and loss area information as it pertains to the Commentors' proposed upgrade and relocation of WOKC-FM, Indiantown, Florida. Figure 6 summarizes in a table the gains and losses of population arising from all of the various elements and the five separate frequency changes comprising the Joint Counterproposal.

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A review of these figures shows not the large additional broadcast service that the Commentors claimed, but rather larger cognizable service losses. Contrary to the Commentors' claim of greatly expanded service to the public, only 459 persons will receive service in an area which is not already saturated by existing full-time aural services. In other words, almost all of the additional service promised by the Commentors occurs in areas which are deemed adequately served under Commission policy. Further, and more importantly, Indiantown's proposed relocation would create a new underserved area containing 4,016 persons. The total underserved area which would no longer receive primary service from the Indiantown CP facility contains 29,409 persons. Only 152 persons presently within an underserved area will gain primary service from the upgraded Indiantown facility.⁴ A summary of the population gains and losses associated with the Commentors' counterproposal is contained in Figure 6.

In comparison, the Key Chain Counterproposal, which is fully compatible with the SBS Petition, would provide primary service signal to an underserved population of 821 persons. See Figure 7. No loss area is associated with the Key Chain Counterproposal. Thus, adoption of the NPRM changes and the Key Chain Counterproposal would bring

⁴Population figures based upon uniform distribution of city, county, and county subdivision population considering 1990 United States Census of Population Data for the state of Florida. "Underserved area" receives fewer than five full-time AM or FM commercial radio primary services.